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662606—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 231

COWELL PORTLAND CEMENT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 3668–3691) was issued on March 6, 1945, and is reported in 148 F. 2d 237. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 412–522) are reported in 40 N. L. R. B. 652.

JURISDICTION

The decree of the court below was entered on March 6, 1945 (R. 3692–3700). Petitions for rehearing filed by the petitioner, by Local 86,[1] and

[1] United Lime & Gypsum Workers' International Union, Local 86, affiliated with the A. F. of L. (*infra*, pp. 3–4, fn. 3).

by the Board, were denied on April 23, 1945 (R. 3701). The petition for a writ of certiorari was filed on July 14, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, when employees strike as a result of being discriminatorily locked out by the employer, and the employer conditions their reinstatement upon their acceptance of membership in a labor organization which is not of their choice, the Board may properly award the employees back pay for a period during which they were on strike and had not applied for reinstatement.

2. Whether the Board, having decided as a matter of policy that the fact that employees may have obtained substantially equivalent employment subsequent to the discrimination against them is irrelevant to the determination of the question whether reinstatement of such employees effectuates the policies of the Act, is required, in each case in which the issue is raised, to restate its reasons for concluding that the reinstatement of such employees will effectuate the policies of the Act.

Two further questions are urged by petitioner (Pet. 4–5) but we believe that they are not presented on the facts of this case. The questions are:

3. Whether petitioner, by discontinuing all transactions in interstate commerce subsequent to a remand by the court below of an earlier Board order and prior to issuance of the Board's final order, ousted the Board from jurisdiction to issue its order.

4. Whether the Board is precluded from awarding back pay for a period during which the employees discriminated against unreasonably delayed the filing of a proper charge with the Board.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix (*infra*, pp. 23–26).

STATEMENT

The original charges in this proceeding were filed by Local 356 [2] on July 17, 1937 (R. 510–511). Upon these charges and supplemental charges the Board issued its complaint against petitioner on August 20, 1937 (R. 511). Following a hearing the Board, on September 6, 1938, issued its decision in which it found that petitioner had violated the Act by conduct which included locking out employees because of their affiliation with Local 356, refusing to bargain with Local 356, and entering into a closed-shop contract with an A. F. of L. union [3] which petitioner had assisted

[2] International Union of Mine, Mill & Smelter Workers of America, Local 356, affiliated with the C. I. O.

[3] Lime & Cement Employees Union of Contra Costa County, No. 21074, affiliated with the A. F. of L. and herein

by its unfair labor practices and which did not represent a majority of petitioner's employees. The Board found that petitioner had thereby engaged in unfair labor practices in violation of Section 8 (1), (3), and (5) of the Act and ordered petitioner, *inter alia,* to cease and desist from its unfair labor practices and to cease giving effect to the closed-shop contract. *Matter of Cowell Portland Cement Company,* 8 N. L. R. B. 1020, 1038–1040. Upon the Board's petition for enforcement of its order, the Circuit Court of Appeals for the Ninth Circuit sustained the Board on the question of the Board's jurisdiction over petitioner, but because the A. F. of L. union had not been made a party to the Board proceeding, the court stated that the Board should have "set [its order] aside, amended its complaint, served it on the A. F. of L. Union, and proceeded to a hearing * * *" *National Labor Relations Board* v. *Cowell Portland Cement Company,* 108 F. 2d 198, 201–202, 206. The court thereupon remanded the case to the Board "for such action as [the Board might] deem proper" (*id.*). Accordingly, the Board set aside its decision and order of September 6, 1938, and the record previously made, amended its complaint so as to

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called Local 21074 and, at times, the A. F. of L. union. In October 1939, Local 21074 was succeeded by United Lime & Gypsum Workers' International Union, Local 86 (R. 488–490; 1892–1894, 1896–1897, 2416–2430, 2978), a party before the Board and the court below in the instant proceeding (*supra,* p. 1).

put in issue the legality of the closed-shop contract, impleaded the A. F. of L. union and its successor, Local 86, and ordered a new hearing to be held (R. 1–3, 8–25). Thereafter, upon the usual proceedings pursuant to Section 10 of the Act, the Board found that petitioner had engaged in unfair labor practices in violation of Section 8 (1), (3), and (5) of the Act, and issued its findings of fact, conclusions of law, and order, which are the subject of the instant proceeding (R. 412–522). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:

Petitioner's employees began to organize Local 356 in May 1937 (R. 427; 664). On May 27, 1937, the day Local 356 was chartered by the C. I. O., W. H. George, petitioner's general manager, reproached Mogus, secretary of Local 356, for being "mixed up" with the C. I. O., which George said was "run by a bunch of Reds and Communists," and stated that he would close the plant rather that deal with *any* labor organization (R. 427–428; 668–671, 708–709, 1047). Similar statements were made to Mogus by his immediate superior, (R. 428; 671–672, 1047–1048). George subsequently warned other employees that the plant would be shut down if the employees affiliated with the C. I. O. (R. 428; 1280–1281). George testified, however, that before the end of June 1937, he had made up his mind that if petitioner's

employees insisted upon organizing a union "it ought to be a federal charter under the California Federation and the American Federation [of Labor]" (R. 427; 1214–1218).

Petitioner's principal owners, the Cowells (R. 569–570, 596–602), were at first willing to bargain with Local 356 (*infra*, p. 7), which by the end of June 1937, represented a majority of petitioner's employees, and had requested petitioner to bargain with it (R. 430; 852–854, 1087–1095, 2207–2212). To forestall such action, which George believed would amount to a "sinister conspiracy" against petitioner's best interests (R. 431; 1225–2226, 1234, 1289, 1301–1302), George, about the middle of June, and repeatedly thereafter, urgently requested the American Federation of Labor to issue a charter for an industrial or plant-wide, union at petitioner's plant (R. 429, 433, 455–456; 1228–1236, 1297). Prior to the lockout (*infra*, pp. 8–9) George's efforts to establish an A. F. of L. union in petitioner's plant, in addition to the foregoing, consisted of his personal solicitation among the employees of a sufficient number of charter members for the proposed organization to satisfy the requirements of the A. F. of L. for the issuance of a charter (R. 433; 1237–1241, 1262–1263, 1267–1268, 1322–1323; 1484–1485, 2275, 2700–2703), and the payment to the A. F. of L. of the initial dues of the proposed local, which he charged to petitioner (R. 433–434; 3359, 3436–3443).

Meanwhile, Local 356 had submitted a proposed contract to petitioner and, in accordance with instructions from the Cowells, petitioner was negotiating with Local 356 through Plant Superintendent Barnett and Gordon Johnson, one of petitioner's attorneys (R. 430; 674–675, 852–854, 888–891, 1087–1095, 2207–2212, 2230, 2243, 2267). Barnett warned the union representatives at the outset that "if Mr. George ever got into the picture the thing might go up in smoke" (R. 430; 674–675). Petitioner was to submit certain counterproposals to the union representative not later than the afternoon of July 16 (R. 434; 681–686, 989–990, 2267–2272, 2606–2607). Petitioner did not fulfill this promise to deliver a counterproposal to Local 356.[4] Instead, on the appointed afternoon, Superintendent Barnett summoned Mogus and told him that the counterproposal would not be forthcoming because "Hell had broken loose in San Francisco[5] * * *" (R. 437; 688–689, 994–995, 3058–3059). Three days later petitioner formally transferred Barnett's authority in labor matters to its attorneys, Thelen and Johnson (R.

[4] On July 15, while soliciting Sayers, an employee, to join the A. F. of L., George maligned the C. I. O. as a "Communistic organization" (R. 435; 2702–2703, 2711–2712), and when Sayers asked why petitioner was negotiating with such an organization George replied "Well, that is a hard question to answer. A great mistake has been made. However, that has all been fixed up now" (id.).

[5] Petitioner's executives, including George, had their offices in San Francisco (R. 421).

438; 2344–2346). Petitioner never resumed bargaining negotiations with Local 356 (R. 483–484; 694). The Board found that petitioner's conduct on and after July 16, 1937, constituted a refusal to bargain with Local 356 in violation of Section 8 (5) of the Act (R. 483–486, 513–514).

About 3:30 p. m., on July 16, shortly after Superintendent Barnett had learned of petitioner's decision not to deliver the counterproposal to Local 356, George ordered Barnett, by telephone, "to shut the plant down, except the pumps" (R. 436; 2614, 1277–1279, 2332, 2646–2649). Barnett thereupon halted operations in practically every department that afternoon and laid off all but a few employees (R. 437; 1339–1368, 1427–1429, 2332–2335, 2944–2963). No explanation for the closing was given to the men or to their supervisors (R. 693, 1717, 1736, 2700, 2717–2719, 2870–2871). The Board found that, statistically, the shut-down was not required either by petitioner's sales records (R. 453; 2811, 2861), or by the state of its supplies of finished cement (R. 453; 2306–2312, 2319, 2814–2818, 2825–2829), or of its supplies of raw materials (R. 453–454; 2810, 2860, 2875–2878, 2891–2893, 2863–2864).

On the next day, July 17, the members of Local 356, provoked by petitioner's failure to submit the counterproposal and believing that the shut-down was a deliberate maneuver to force the employees to abandon the C. I. O., held a meeting and voted to strike (R. 438, 488; 705–708, 1019-

1020, 1146–1147, 3247–3250). The strike began on July 18, with the picketing of petitioner's plant (R. 1058, 2345). The Board found that the shut-down was, in fact, a lock-out designed to force petitioner's employees to abandon the C. I. O. and to adopt the A. F. of L. as their bargaining representative and that it constituted a discriminatory discharge of the employees involved, in violation of Section 8 (3) of the Act (R. 459–460, 514).

While the lock-out progressed George succeeded in having the A. F. of L. issue a charter for a local (No. 21074) at petitioner's plant (R. 441; 1236), and informed the employees individually (R. 439, 441–442; 1481, 1718–1719, 2703–2705) and collectively (R. 444–445; 1496–1504, 1615–1617) that they would have to join the A. F. of L. to obtain further employment with petitioner.[6] Petitioner's attorney, Thelen, likewise informed representatives of Local 356 that petitioner would not resume operations with a working force affiliated with the C. I. O., saying that if it did, the A. F. of L. would boycott its product (R. 1146, 1197–1200). At the same time Thelen offered to reopen the plant and put the men back to work if they became members of the A. F. of L. (*id.*). After the A. F. of L. charter was issued George assisted the new local by furnishing it with an

[6] Two of petitioner's foremen exerted similar pressure upon employees on behalf of the A. F. of L. (R. 439–440; 1481–1484, 1606–1608, 1752–1760).

office in the plant, which it occupied rent-free from August until December 1937 (R. 441; 1491–1496, 1571–1572, 1584).[7] On August 27, petitioner and Local 21074 executed a closed-shop contract, prepared by petitioner's attorneys (R. 445–446; 1253–1262, 1511–1512, 1623–1624, 3202), although the local claimed only 27 members (R. 446–447; 224, 1532–1550, 3605–3608) in a bargaining unit of 196 employees. On September 7, petitioner formally notified a committee of its striking employees, who in turn informed the membership of Local 356, that it would require membership in Local 21074 as a condition of reinstatement (R. 448; 699–701, 1033, 1038, 3466–3468). On October 1, 1937, petitioner reopened all departments of its plant (R. 1285), but took back only those employees who joined Local 21074 (R. 520–522, 1897, 2435, 2978, 3398–3420).

The Board's order requires petitioner to cease and desist from unfair labor practices, to cease giving effect to its closed-shop contracts with the A. F. of L. unions, to withdraw recognition from them as the exclusive representatives of its employees until they are certified by the Board as such representatives, to offer reinstatement with back pay from July 16, 1937, the date of the lock-out, to the employees discriminated

[7] Petitioner also rendered other assistance to the A. F. of L. local (R. 443–444, 448; 1463–1474, 1487–1491, 1523, 1570, 1656–1689, 1700–1714).

against (with 4 exceptions not material here[8]), and to post appropriate notices (R. 515–522).

The Board filed in the court below a petition for enforcement of its order (R. 524–535), and on March 6, 1945, the court handed down its opinion and entered its decree enforcing the order (R. 3668–3700) with modifications not here material.[9]

ARGUMENT

1. The first question stated in the petition (Pet. 4–5, Br. 16–20) is whether the Board may properly issue an order against an employer who, at the time he committed unfair labor practices, was engaged in commerce within the meaning of the Act (Sec. 2 (6)), but who, at the time the Board issued its decision and order, was not engaged in such commerce. We submit that the instant case, upon the facts as found by the

[8] See R. 461–463, 504–505, 517–518.

[9] In its decree the court struck from the Board's order paragraph 1 (f) which required petitioner to cease and desist from "In any other manner interfering with, restraining, or coercing its employees" in the exercise of their rights as guaranteed in Section 7 of the Act (R. 516, 3684, 3691, 3692–3693) and modified paragraph 2 (b) of the Board's order by adding a proviso thereto defining the terms "loss" and "net earnings" (R. 517, 3691, 3692, 3695). While we think these modifications unjustified, for the reasons set forth in the Board's petition for certiorari in *National Labor Relations Board* v. *Chenery California Lumber Co.*, No. 319, filed August 13, 1945, the desirability of avoiding further delay in securing enforcement of the remainder of the Board's order in this case has led us not to file a cross-petition.

Board and sustained by the court below, does not present this question.

Petitioner does not question the validity of the Board's finding, sustained by the court below in its earlier decision (108 F. 2d 198, 201–202), that petitioner was engaged in commerce, within the meaning of the Act, at the time the unfair labor practices were committed (Br. 30).[10] The Board found that petitioner, subsequent to the remand of this case to the Board in November 1939 (*supra*, p. 4), attempted to discontinue all transactions in interstate commerce, in order to avoid the consequences of its prior violation of the Act (R. 491–499; 1928–1930, 2049–2059, 2093–2095, 2097–2098, 2110–2111, 2125–2127, 3569, 3573–3574, 3576–3583, 3595, 3599–3600). The Board found, however, contrary to petitioner's assertions, that at the time of the hearing before

[10] Petitioner, a large manufacturer of Portland cement operating a plant at Cowell, California, is one of three affiliated, and commonly owned and managed, companies which together constitute a single integrated enterprise engaged in the production, sale, and distribution of cement and building materials. For several years prior to the hearing in 1940 petitioner shipped in interstate commerce large quantities of cement and of materials and supplies necessary to its operations. The Board's detailed findings with respect to the above facts appear at R. 420–424 and the supporting evidence at R. 9, 43, 286–287, 569–578, 586–602, 607–614, 655–662, 1299–1300, 1410–1411, 1824, 1828–1830, 1847, 1849, 1854, 1946–1961, 1980–1997, 2025–2026, 2065–2069, 2088–2091, 2097, 2099–2101, 2115, 2118–2124, 2143, 2147, 2152, 2168–2198, 3097–3098, 3332–3371, 3545–3546, 3549–3551, 3558, 3560–3562, 3566–3568.

the Trial Examiner, in June 1940, petitioner was still engaging in substantial transactions affecting interstate commerce.[11] Thus, during the first six months of 1940, while petitioner made no sales in interstate commerce, it received materials and supplies worth $75,967, of which 28 percent, valued at $21,214,[12] originated outside the State (R. 496), and of which a substantial part was shipped directly to petitioner from outside the State. On these facts the Board concluded that petitioner's operations "still have a close, intimate, and substantial relation to" interstate commerce (R. 497). Sustaining the Board's findings of fact and its jurisdictional conclusions, the court below stated (R. 3677–3678) that the "Transportation of such materials, equipment and supplies into California from points outside the State was commerce [Sec. 2 (6) of the Act]. The Board found, and the finding is supported

[11] The court below, referring to petitioner's shipments of materials and supplies up to June 20, 1940, the time of the hearing stated: "There being * * * no claim or suggestion that shipments and deliveries ceased on that date, we may and do assume that they continued" (R. 3677–3678).

[12] Of this amount, $16,378 represents materials and supplies ordered by petitioner in 1939 and shipped direct to petitioner in 1940 from outside of California (R. 496; 3519–3520); $3,885 represents materials and supplies manufactured outside the State and filled from stock maintained by sellers within the State (R. 3513–3515); and $951 represents materials and supplies manufactured outside the State and shipped to the seller in California to fill petitioner's order, and then reshipped to petitioner (R. 3517–3519).

by substantial evidence, that * * * [petitioner's] unfair labor practices tended to lead to labor disputes burdening and obstructing that commerce and the free flow thereof and therefore were unfair labor practices affecting commerce [Sec. 2 (7) of the Act]".

There is no basis for petitioner's suggestion that the holding of the court below that its practices at the time of the hearing affected commerce departed from the theory adopted by the Board. The Board did not merely find, as petitioner claims, that petitioner was engaged in interstate commerce, as it was,[13] but also that its activities burdened commerce (R. 497). The Board and the court were thus entirely consistent. The Board also found (R. 498–500), we believe correctly, that even if petitioner had abandoned its interstate sales and purchases after the commission of the unfair labor practices, the Board would not be ousted of jurisdiction to issue a remedial order. But the court below did not and this Court need not pass upon that issue. Inasmuch as the court below did not decide whether the Board's jurisdiction was to be determined as of the time of the issuance of the complaint or as of the time of the Board's decision, the issue petitioner seeks to raise is not presented and the decision below in no sense conflicts with *United Corporation* v. *Federal Trade Commission,* 110 F. 2d 473, 476 (C. C. A. 4) and *Chamber of Com-*

[13] *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564.

merce of Minneapolis v. *Federal Trade Commission*, 13 F. 2d 673, 685 (C. C. A. 8).

2. Petitioner's major contention with respect to the Board's back pay order (Br. 29–35) is that the Board may not properly award back pay to striking employees who have not applied for reinstatement. But here not only was the strike caused by the employer's unfair labor practices; the employer had informed the strikers that they would be reinstated only if they accepted the illegal requirement that they abandon the C. I. O. and became members of the A. F. of L.[14]

It is true that the general rule, exemplified by the cases cited by petitioner (Br. 32–34), is that the Board, as a matter of policy, will not award back pay to employees for a period during which they are striking, even when they are striking as a result of the employer's unfair labor practices, and that the strikers must demonstrate their willingness to return to work by applying for reinstatement.[15] Ordinarily, in such cases, the Board will award back pay only from the time the strikers, upon such application for reinstatement,

[14] Petitioner, by statements to the employees and by its execution of the illegal closed-shop contract with the A. F. of L. union, made it clear to the strikers that they could obtain reinstatement only if they abandoned the C. I. O. and became members of the A. F. of L. union (*supra*, pp. 9–10).

[15] *Matter of Long Lake Lumber Company*, 34 N. L. R. B. 700, 718; National Labor Relations Board, *Third Annual Report* (1938), p. 210; *Fourth Annual Report* (1939), p. 102; cf. *Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177, 198.

are either refused reinstatement altogether or are offered reinstatement subject to the imposition of further illegal restraints upon their rights under the Act.[16] However, where, as in the instant case, the employer openly and in advance conditions the acceptance of a striker's application for reinstatement upon the striker's acceptance of unlawful restraints upon his statutory rights, the Board need not require the striker to make the useless gesture of an application for reinstatement but may treat him as an employee discriminatorily discharged and, as such, entitled to back pay from the time of the discrimination against him. *Eagle-Picher Mining & Smelting Co.* v. *National Labor Relations Board,* 119 F. 2d 903, 914–915 (C. C. A. 8); *National Labor Relations Board* v. *Sunshine Mining Co.,* 110 F. 2d 780, 792 (C. C. A. 9), certiorari denied, 312 U. S. 678;[17] *National Labor Relations Board* v. *Carlisle*

[16] *National Labor Relations Board* v. *American Mfg. Co.,* 106 F. 2d 61, 68 (C. C. A. 2), affirmed as modified, 309 U. S. 629; *National Labor Relations Board* v. *Poultrymen's Service Corporation,* 138 F. 2d 204, 210 (C. C. A. 3); *Birmingham Post Company* v. *National Labor Relations Board,* 140 F. 2d 638, 639 (C. C. A. 5), enforcing 49 N. L. R. B. 206, 210; *Polish National Alliance* v. *National Labor Relations Board,* 136 F. 2d 175, 181 (C. C. A. 7), affirmed, 322 U. S. 643; *National Labor Relations Board* v. *Lettie Lee, Inc.,* 140 F. 2d 243, 244 (C. C. A. 9), enforcing 45 N. L. R. B. 448, 460–463; see National Labor Relations Board, *Fourth Annual Report* (1939), p. 105.

[17] Contrary to petitioner's contention (Br. 31), the *Sunshine Mining* case, *supra,* is not distinguishable from the instant case with respect to the point under discussion. In

Lumber Co., 94 F. 2d 138, 142–143 (C. C. A. 9), certiorari denied, 304 U. S. 575, and 99 F. 2d 533, 535–536, 539, certiorari denied, 306 U. S. 646; *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 888 (C. C. A. 1), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *A. Sartorius & Co.*, 140 F. 2d 203, 205, 207 (C. C. A. 2). Cf. *Idaho Potato Growers, Inc.* v. *National Labor Relations Board*, 144 F. 2d 295, 304–305 (C. C. A. 9), certiorari denied, 323 U. S. 769; *Subin* v. *National Labor Relations Board*, 112 F. 2d 326, 331 (C. C. A. 3), certiorari denied, 311 U. S. 673.

Moreover, where, as here (*supra*, p. 9), employees are locked-out by the employer, the Board may award back pay to the employees for the period of the lock-out even though the employees subsequently strike during that period. Precisely in point is *National Labor Relations Board* v. *Long Lake Lumber Company*, 138 F. 2d 363, 364-365 (C. C. A. 9), enforcing 34 N. L. R. B. 700, 721–723. In its decision in that case the Board stated:

> When employees voluntarily go on strike even in protest against unfair labor practices, it has been our policy not to award them back pay during the period of the strike. In the instant case, however, the

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both cases the court enforced the Board's orders awarding back pay to strikers despite the fact that the strikers had not applied for reinstatement.

> commencement of the strike on June 7, because of the lock-out of the employees, did not terminate the respondents' obligation to make payments of back pay to the locked out employees since on that date the lock-out was in existence and the strike had no effect on the situation (34 N. L. R. B. at 718).

See also National Labor Relations Board, *Fourth Annual Report* (1939), p. 102; *Sixth Annual Report* (1941), p. 75. Petitioner's termination of the lock-out by the resumption of operations in October 1937, of course, did not suspend the accrual of back pay, since the unlawful conditions which petitioner had attached to the reinstatement of the lock-out employees were never removed (*supra*, p. 10).

The decisions in *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. 2d 61, 68 (C. C. A. 2), affirmed as modified, 309 U. S. 629; *United Biscuit Co.* v. *National Labor Relations Board*, 128 F. 2d 771, 778 (C. C. A. 7); and *Polish National Alliance* v. *National Labor Relations Board*, 136 F. 2d 175, 181 (C. C. A. 7), affirmed, 322 U. S. 643, are not in conflict with the decision of the court below, as petitioner alleges (Pet. 8, Br. 32–34). The cited decisions stand only for the general rule that a striker's application for reinstatement may properly initiate the running of back pay. They did not hold that such an application is essential upon facts such as are presented in this case.

3. Petitioner's further contention (Pet. 9, Br. 35–38) that the scope of the Board's back pay order should be reduced because the complaining employees "unreasonably" failed to file a "proper charge" during the period from July 17, 1937 to May 8, 1940, is frivolous.

The employees first filed a charge on July 17, 1937, (Bd. Ex. 1-a), the day after petitioner locked them out, and the Board's original complaint was issued on August 20 (Bd. Ex. 1-c). The failure of the charge to mention the A. F. of L. contract executed some time later and of the Board to make the A. F. of L. a party to its subsequent proceeding did not reduce the effect of the charge as a notice to petitioner that the employees were contending that the lock-out was unlawful.

This is plainly not a case in which delay in filing charges lulled the employer into failure to reinstate or otherwise prejudiced him, as was *National Labor Relations Board* v. *Mall Tool Co.*, 119 F. 2d 700, 702, 704 (C. C. A. 7), cited by petitioner. Unquestionably, petitioner was aware from the time that the original charge was filed on July 17, 1937, that the employees were insisting that the lock-out on the previous day was illegal, and that if the charges were sustained, back pay might accrue from that time. As the Board declared (R. 511), petitioner "has at all times since the service of the original complaint been on notice of the precise claims made on behalf

of the Government." In so far as any delay was caused by the remand of the case and the filing of an amended charge, it was not attributable to the complaining employees or to Local 356,[18] but to the Board's failure in the initial hearing to put in issue the question of the validity of petitioner's closed-shop contract with the A. F. of L. union (*supra*, p. 4). It is settled, as petitioner apparently concedes (Br. 36–37), that delays caused by the Board would not warrant withholding from the employees back pay to which they would otherwise be entitled. *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 697–698; *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. 2d 585, 597 (C. C. A. 9). Cf. *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 583.

4. In *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, the Court held that the Board could not require reinstatement for employees who might have obtained substantially equivalent employment elsewhere unless it indicated "that it has exercised the discretion with which Congress has empowered it" to develop particular remedies, and shown why it believed the remedy selected necessary to the effectuation of the policy of the statute. In the

[18] The final order of the Circuit Court of Appeals setting aside the Board's original decision was entered on December 30, 1939 (108 F. 2d 198), and the amended charge filed May 8, 1940. Petitioner is not contending that this four-month period was unduly long.

Board's subsequent decision in *Matter of Ford Motor Company,* 31 N. L. R. B. 994, 1099–1100, the Board fully set forth its reasons for concluding as a matter of general policy that "the mere obtainment of substantially equivalent employment, and evidence pertaining thereto, is irrelevant to considerations decisive of the question whether reinstatement effectuates the policies of the Act." In the *Ford* case the Board explicitly stated that these "decisive considerations do not vary from case to case". In the instant case the Board did not restate the considerations set forth in the *Ford* opinion, but merely cited that case in support of the statement that the portion of the order in question "is necessary to assure effectively the right of self-organization to the respondent's employees and thus effectuate the policies of the Act" (R. 507).

Petitioner's contention is that the Board is required to restate fully the reasoning behind its determination in every case, and that it was not sufficient merely to refer to the *Ford* case for the reasons underlying the Board's conclusion. A similar argument was rejected by this Court in *Republic Aviation Corp* v. *National Labor Relations Board,* No. 226, 1944 Term, decided April 23, 1945. The same conclusion has been reached by five circuit courts of appeals.[19] Obviously the

[19] *National Labor Relations Board* v. *Brezner Tanning Co.,* 141 F. 2d 62, 65 (C. C. A. 1); *National Labor Relations Board* v. *Regal Knitwear Co.,* 140 F. 2d 746, 747 (C. C. A. 2), af-

Phelps Dodge decision was not designed to impose upon the Board an inflexible requirement that policy considerations which do not vary with the facts of particular cases must be repeatedly restated at length.

CONCLUSION

Upon the issues raised by the petition the decision below is correct; gives rise to no conflict of decisions; and involves no question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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AUGUST 1945.

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firmed, 324 U. S. 9; *National Labor Relations Board* v. *Van Deusen*, 138 F. 2d 893, 895 (C. C. A. 2); *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. 2d 494, 498 (C. C. A. 3); *National Labor Relations Board* v. *Moltrup Steel Products Co.*, 121 F. 2d 612, 614 (C. C. A. 3); *National Labor Relations Board* v. *Blanton Co.*, 121 F. 2d 564, 570–571 (C. C. A. 8); *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. 2d 585, 596–597 (C. C. A. 9).